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## Putting Mandatory Summary Jury Trial Back on the Docket: Recommendations on the Exercise of Judicial Authority

### Cover Page Footnote

The author gratefully acknowledges the research assistance of Margo Reder, Adjunct Professor of Law and Research Associate, Bentley College, on this Article.

# PUTTING MANDATORY SUMMARY JURY TRIAL BACK ON THE DOCKET: RECOMMENDATIONS ON THE EXERCISE OF JUDICIAL AUTHORITY

LUCILLE M. PONTE\*

## INTRODUCTION

WITH the spiraling costs,<sup>1</sup> excessive delays,<sup>2</sup> and exploding caseloads of the civil courts,<sup>3</sup> many disputants view traditional litigation as unable to meet their conflict resolution needs.<sup>4</sup> More and more parties are turning away from the judicial system and are resorting to private dispute resolution firms.<sup>5</sup> Recognizing this growing

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\* Assistant Professor of Law, Bentley College. The author gratefully acknowledges the research assistance of Margo Reder, Adjunct Professor of Law and Research Associate, Bentley College, on this Article.

1. Critics of the court system claim that \$80 billion are swallowed up in legal fees and insurance premiums each year. Some legal scholars challenge that figure, claiming that the price tag is somewhere between \$51 and \$58 billion dollars. Michele Galen, *Guilty!*, *Bus. Wk.*, Apr. 13, 1992, at 60, 61-62.

2. *Id.* at 60-61, 63. Once filed, the typical civil lawsuit languishes for some 19 months in court. Bob Cohn, *The Lawsuit Cha-Cha*, *Newsweek*, Aug. 26, 1991, at 58. Due to speedy trial requirements, civil matters often are deferred to allow judges to deal first with the ever-increasing number of criminal cases. Charles F. Webber, *Mandatory Summary Jury Trial: Playing by the Rules?*, 56 *U. Chi. L. Rev.* 1495, 1500-01 (1989); Judith M. Filner & Margaret Shaw, *Update: Development of Dispute Resolution in State Courts*, *Forum* (National Institute for Dispute Resolution), Summer/Fall 1993, at 36; Galen, *supra* note 1, at 61.

3. Between 1984 and 1990, civil filings in the state courts have increased from 14.1 million to 18.4 million cases. Galen, *supra* note 1, at 61. In the federal courts, civil lawsuits have jumped 300% since 1960. *Id.* However, some legal scholars question whether any litigation explosion is actually taking place. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About our Allegedly Contentious and Litigious Society*, 31 *UCLA L. Rev.* 4, 61-71 (1983) (asserting that claims of litigation explosion are linked to poor contemporary legal scholarship and policy analysis); Shirley A. Wiegand, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials*, 69 *Or. L. Rev.* 87, 95-97 (1990) (arguing that case filings, case filings per authorized judgeship, and the number of civil trials have actually decreased between 1985 and 1988).

4. Filner & Shaw, *supra* note 2, at 36; Galen, *supra* note 1, at 60-61; *see infra* note 5 and accompanying text.

5. See Deborah L. Jacobs, *Keeping It Out of Court*, *Mgmt. Rev.*, Oct. 1992, at 54-55; Robert D. Raven, *The Future of Court-Annexed ADR*, *Disp. Resol. Mag.*, Spring 1994, at 2. This assertion is bolstered by figures released by nonprofit and for-profit ADR providers. For example, the nonprofit American Arbitration Association reported that its case filings exploded over 150%, from 39,609 in 1984 to 63,171 in 1993. Ted E. Pons, *AAA Business Expanded in 1993*, *Disp. Resol. Times*, Spring 1994, at 1.

The leading for-profit ADR provider, Judicial Arbitration and Mediation Services, Inc., saw its caseload jump to 14,000 in 1992, up 25% over its 1991 filings. Jane Birnbaum & Morton D. Sosland, *Coming to Terms—Without Bringing in the Lawyers*, *Newsweek*, Apr. 13, 1992, at 63. In these budget-conscious times, many businesses, in particular, are looking to ADR to help cut costs. In a 1992 *Business Week/Harris*

trend towards alternative dispute resolution ("ADR"),<sup>6</sup> an increasing number of state and federal courts are offering a wide range of ADR mechanisms to litigants.<sup>7</sup>

One controversial ADR mechanism is the summary jury trial ("SJT"), a nonbinding settlement process that involves summary presentations of proof before an advisory jury.<sup>8</sup> For years, SJT has generated divided federal court opinions and legal critiques on its mandatory use.<sup>9</sup> Some courts and legal commentators have rejected compulsory SJT as violative of the Federal Rules of Civil Procedure (the "Rules") and as exceeding the courts' inherent power to manage case dockets.<sup>10</sup> Other judges and legal analysts have asserted that there is substantial legal support for mandatory SJT under these same Rules and within the courts' inherent authority.<sup>11</sup> The 1993 *In re NLO, Inc.* case,<sup>12</sup> rejecting compulsory SJT, renewed the swirl of controversy over SJT and focused attention once more on this contentious legal debate. However, December 1993 changes to the Rules and a closer analysis of earlier Supreme Court decisions have turned the tables again in favor of mandatory SJT.<sup>13</sup>

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Executive poll, a whopping 97% of polled business executives stated that their companies are making greater use of ADR to resolve their disputes in a more cost-effective manner. Galen, *supra* note 1, at 66.

6. The acronym "ADR" refers to a collection of processes that include, but are not limited to, negotiation, mediation, arbitration, mini-trial, summary jury trial, and other hybrid procedures. See Stephen B. Goldberg et al., *Dispute Resolution* (1985); Susan M. Leeson & Bryan M. Johnston, *Ending It: Dispute Resolution in America* (1988). See generally *Essays on the Future of ADR: A Prospective Look from Three Viewpoints—Jurist, Educator, and Practitioner*, 14 Pepp. L. Rev. 769 (1987) (providing an interesting collection of essays on ADR); Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. Chi. L. Rev. 424 (1986) (providing a basic overview of benefits and criticisms of ADR).

7. Filner & Shaw, *supra* note 2, at 36-43; Raven, *supra* note 5, at 2; Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 Harv. L. Rev. 1086, 1086-87, 1090-91 (1990). More than 1200 state and federal courts nationwide are offering ADR options to litigants. Galen, *supra* note 1, at 64. As of 1992, 27 states and the District of Columbia had formally adopted comprehensive ADR programs. Filner & Shaw, *supra* note 2, at 36. Today, virtually every state is undertaking pilot or experimental court-connected ADR programs. *Id.* About 40% of the federal district courts and nearly 50% of the federal appeals courts either promote or mandate ADR use as a precondition to trial. Jacobs, *supra* note 5, at 55.

8. See Thomas D. Lambros, *Summary Jury Trials*, Litig., Fall 1986, at 52; Lawrence J. Tell & Paul Angiolillo, *From Jury Selection to Verdict—In Hours*, Bus. Wk., Sept. 7, 1987, at 48; *infra* notes 51-65 and accompanying text.

9. See *infra* notes 66-185 and accompanying text.

10. See *infra* notes 119-44 and accompanying text.

11. See *infra* notes 167-85 and accompanying text.

12. 5 F.3d 154 (6th Cir. 1993).

13. See *infra* notes 177-97 and accompanying text.

Part I of this Article provides an overview of SJT and discusses the invention of SJT by Judge Thomas D. Lambros.<sup>14</sup> This part considers SJT objectives, procedures, and basis under the Rules.<sup>15</sup> The main criticisms of and concerns about SJT also are highlighted, along with applicable studies on SJT issues.<sup>16</sup> Part II analyzes the divergent federal court decisions on mandatory SJT, focusing on opposing court interpretations of Rule 16.<sup>17</sup> Recent changes in statutory law and the Rules now make it clear that judges have the power to require SJT without the parties' consent.<sup>18</sup> This part argues that the federal courts derive this authority from these legal changes and from the courts' inherent authority to manage effectively the case docket.<sup>19</sup> Part III suggests that, although they possess the legal authority to mandate SJT, federal judges lack policies for SJT case selection and processing.<sup>20</sup> This Article argues that judges should exercise this power under court guidelines aimed at protecting party and court interests.<sup>21</sup> Part III therefore makes several recommendations for case screening and supervision that seek to enhance SJT benefits while accounting for SJT criticisms.<sup>22</sup> The suggested guidelines call for improved court record-keeping and evaluation as well as increased attorney education on SJT and other ADR mechanisms.<sup>23</sup>

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14. Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984) [hereinafter referred to in text as the "Lambros Report"].

After reviewing the Lambros Report, the Judicial Conference of the United States adopted a resolution endorsing the experimental use of SJT to help promote settlement. Report of the Proceedings of the Judicial Conference of the United States 88 (1984). The resolution stated: "Resolved, that the Judicial Conference endorses the experimental use of summary jury trials as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases." *Id.*

15. See *infra* notes 24-50 and accompanying text.

16. See *infra* notes 66-114 and accompanying text.

17. See *infra* notes 115-85 and accompanying text.

18. See *infra* notes 186-97 and accompanying text.

19. The Supreme Court clearly has recognized that the courts possess inherent authority to control and manage their dockets, independent of the Rules and statutory law. *Colgrove v. Battin*, 413 U.S. 149, 160-61 (1973); *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962). This inherent power allows the courts to develop procedural mechanisms that promote the efficient, orderly disposition of cases while preserving the integrity of the judicial process. *Colgrove*, 413 U.S. at 160-61; *Link*, 370 U.S. at 630-31; *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 651 (7th Cir. 1989); *Federal Reserve Bank v. Carey-Canada, Inc.*, 123 F.R.D. 603, 604 (D. Minn. 1988); *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448, 449 (M.D. Fla. 1988). The main limit on the exercise of this discretion is that the procedural modifications should not interfere with or prevent the final determination of the case by a jury. See *Colgrove*, 413 U.S. at 159-60; *infra* notes 170-85 and accompanying text.

20. See *infra* note 198 and accompanying text.

21. See *infra* notes 198-211 and accompanying text.

22. See *infra* notes 199-211 and accompanying text.

23. See *infra* notes 199-211 and accompanying text.

## I. OVERVIEW OF SUMMARY JURY TRIAL

Federal and state court systems have tried to deal creatively with public concerns about the time, cost, and delays associated with traditional litigation. SJT is an example of a judicial innovation aimed at responding effectively to these concerns. This nonbinding process encourages settlement while providing litigants with some of the key elements of an actual jury trial.

A. *Creation of SJT*

Federal court Judge Thomas Lambros invented SJT while considering two personal injury cases slated for trial before two separate, full juries.<sup>24</sup> Judge Lambros thought that each case should have settled, but the parties decided to go forward with a full trial.<sup>25</sup> In the 1984 Lambros Report, he outlined the main obstacles to settlement that led to his creation and implementation of SJT:

Litigants may refuse to accept a compromise because emotionally they need a "day in court" to tell their story. Absent the opportunity to hear both sides of the case presented to the finders of fact, a lawyer and his client may be unable to objectively recognize the weaknesses in their position. The lawyer and his client may believe they can "pull off" a weak case if only they can get it in front of a jury.<sup>26</sup>

Judge Lambros stated that SJT, with the aura of the courtroom experience, could bring down these typical barriers to settlement. His report concluded that these obstacles could be overcome once the parties had a chance to state their case, listen to the other side's view, and learn of a jury's reaction to the conflicting evidence.<sup>27</sup> Judge Lambros asserted that other methods of ADR, such as mediation, pri-

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24. Lambros, *supra* note 14, at 463.

25. *Id.* Judge Lambros mused:

It occurred to me that if only the parties could gaze into a crystal ball and be able to predict, with a reasonable amount of certainty, what a jury *would* do in their respective cases, the parties and counsel would be more willing to reach a settlement rather than going through the expense and aggravation of a full jury trial.

*Id.*

26. Lambros, *supra* note 14, at 468; *see also* McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 50 (E.D. Ky. 1988) (upholding mandatory use of SJT); Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 604-05 (D. Minn. 1988) (same).

27. Lambros, *supra* note 14, at 468-69, 476-77; *see McKay*, 120 F.R.D. at 50; *Federal Reserve Bank*, 123 F.R.D. at 604-05; James J. Alfini, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 Ohio St. J. on Disp. Resol. 213 (1989) (reporting a comparison study of SJT use in Florida state and federal program) [hereinafter referred to in text as the "Alfini study"]. Under the state program, the Alfini study showed that SJT did help to improve attorney-client discussions over appropriate settlement postures. Defense and plaintiff attorneys believed that SJT did help their clients to have a more realistic view of settlement offers. Alfini, *supra*, at 218.

vate judging, or court-annexed arbitration, do not afford disputants the same opportunity to deal fully with these barriers to settlement.<sup>28</sup> Judge Lambros believed that SJT successfully balances the need to reduce costs and caseloads against the rights of parties seeking justice from the court system.<sup>29</sup>

Based on these assumptions, Judge Lambros devised SJT as a court-initiated, court-supervised settlement procedure<sup>30</sup> that would save the costs and time of a full-blown trial for both the courts and the parties.<sup>31</sup> The process initially was envisioned as voluntary and nonbinding.<sup>32</sup> Judge Lambros believed that SJT would help parties predict juror perceptions of liability and damages,<sup>33</sup> and, therefore, serve to encourage settlement without a complete trial.<sup>34</sup> As a settlement tool,

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28. Lambros, *supra* note 14, at 468. The report also summarizes the other main forms of ADR being utilized to reduce court caseloads: arbitration, mediation, private judging, neutral experts, and mini-trial. *Id.* at 466-68.

29. *Id.* at 476. *But see* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 Fla. St. U. L. Rev. 1, 6-13, 18-21 (1991) (expressing concern that ADR mechanisms often emphasize quantity over quality of justice in disposing of cases); Neil Vidmar & Jeffrey Rice, *Jury-Determined Settlements and Summary Jury Trials: Observations About Alternative Dispute Resolution in an Adversary Culture*, 19 Fla. St. U. L. Rev. 89, 90-91, 95, 97-98 (1991) (suggesting that use of voluntary, binding ADR will help shift emphasis from quantity to quality of justice in case resolution).

30. Lambros, *supra* note 14, at 467-68.

31. *Id.* at 465, 468, 476. *But see infra* notes 66-86 and accompanying text.

32. Lambros, *supra* note 14, at 469, 477.

33. *Id.* at 468-69. SJT is the only ADR mechanism that utilizes the tradition of trial by jury. *Id.* at 468. Judge Lambros noted:

It is my perception that the sole bar to settlement in many cases is the uncertainty of how a jury might perceive liability and damages. Such uncertainty often arises, for example, in cases involving a "reasonableness" standard of liability, such as in negligence litigation. . . . The half-day proceeding is designed to provide a "no-risk" method by which the parties may obtain the perception of six jurors on the merits of their case without a large investment of time or money.

*Id.* at 469; *see* Leeson & Johnston, *supra* note 6, at 25.

34. Lambros, *supra* note 14, at 465, 468, 476. A number of legal commentators have questioned the appropriateness of court policies that focus on settlement as a positive or best outcome of legal disputes. Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 Tul. L. Rev. 1, 15-27 (1987); Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1075-89 (1984); Wiegand, *supra* note 3, at 97-98. *But see* Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. Rev. 485, 486-90, 498-514 (1985). Prof. Menkel-Meadow correctly states:

Critics like Fiss . . . assume that adjudication is the preferred process and challenge the "settlers" to prove up their claims. . . . My own view is that settlement is now the norm. The pertinent question is how can it be used most effectively (for the parties and for other users of the system) when traditional adjudicators are brought into the process.

*Id.* at 513.

SJT is normally considered to be a confidential process closed to third parties.<sup>35</sup>

The new SJT process was utilized in the second of the two personal injury cases before Judge Lambros, and the parties settled the matter without a full jury trial.<sup>36</sup> Judge Lambros and other federal court judges continued to experiment with SJT on their own, viewing the procedure as complementing, not replacing, a host of other ADR mechanisms.<sup>37</sup> In the Lambros Report, supportive federal judges indicated substantial cost and time savings through the use of SJT.<sup>38</sup> Even in instances in which SJT did not result in settlement, some federal judges hailed the process as clarifying issues of law and fact prior to trial and improving attorney preparation for, and accelerating case processing of, any subsequent trial.<sup>39</sup>

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35. Lambros, *supra* note 14, at 471. The relevant case on SJT access asserts that both the process and documents utilized in SJT should be kept confidential. *Cincinnati Gas and Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 903-05 (6th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989) (barring newspapers from access to SJT of contract dispute involving design and construction of nuclear power plant); see Susan Tillotson, Note, *Summary Jury Trials: Should the Public Have Access?*, 16 Fla. St. U. L. Rev. 1069 (1989) (analyzing and supporting confidentiality for SJT as settlement procedure). This SJT confidentiality has been criticized in instances involving public interest matters that should be resolved in a public forum and that may set important precedent for society. Menkel-Meadow, *supra* note 29, at 25-29; see *infra* note 206 and accompanying text. The same criticism also applies to other confidential ADR mechanisms used in both court-connected and private arenas.

36. Lambros, *supra* note 14, at 463. The second case involved a products liability action based upon the assertion of a defective football helmet. *Id.*

37. *Id.*

38. The Lambros Report contained findings of experimental SJT use in the Northern District of Ohio. The statistics showed that 90% of all cases selected for SJT were settled before trial. Of SJTs actually held, 92% resulted in settlement. *Id.* at 472-73. Generally, settling cases without a trial can reduce the expenditure of time and money by the parties as well as the courts and taxpayers. Judge Lambros estimated that the 49 SJTs saved the court over \$73,000 in reduced juror costs alone. His report pointed to increased SJT use in Ohio and other federal district courts as further supporting his assertion of the cost and time savings of SJT. *Id.* at 473-76.

Aside from Judge Lambros's district in Ohio, district court judges in Montana, Michigan, Colorado, Pennsylvania, Florida, and Hawaii also utilized the process successfully and pointed to substantial cost and time savings. *Id.* at 474-76; see *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 49-50 (E.D. Ky. 1988); see also S. Arthur Spiegel, *Summary Jury Trials*, 54 U. Cin. L. Rev. 829 (1986) (recounting successful SJT use in Southern District of Ohio).

39. *Federal Reserve Bank v. Carey-Canada, Inc.*, 123 F.R.D. 603, 607 (D. Minn. 1988); *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448, 449 (M.D. Fla. 1988). In *Arabian American Oil*, Judge Kovachevich asserted:

Even if the summary procedures do not culminate in settlement of the case, the value of the summary trial in crystallizing the issues and the proof is immeasurable to the later binding trial, to which all parties come more fully prepared and rehearsed in their roles and the trial procedure. . . . Many attorneys come to trial prepared; *others do not*. After the jury is sworn in an involved case, it is an embarrassing professional exercise before the court and jury to see lawyers floundering in their presentations . . . . The reality is that too many will *not* get ready until the day of a trial; a summary trial *forces* that day and that preparation!



In creating SJT, Judge Lambros looked to support from various provisions of the 1983 Federal Rules of Civil Procedure. The report noted that Rule 1 directs courts to interpret the Rules "to secure the just, speedy, and inexpensive determination of every action."<sup>40</sup> The report also stated that Rule 1 calls for judicial creativity, through mechanisms such as SJT, to meet the Rule 1 requirements of rapid, cheap, and fair dispute resolution.<sup>41</sup>

Judge Lambros further stated that Rule 16,<sup>42</sup> in conjunction with Rule 1, explicitly grants courts broad discretion to manage pre-trial activities<sup>43</sup> aimed at "expediting the disposition of the action"<sup>44</sup> and "facilitating the settlement of the case."<sup>45</sup> In addition, Rule 16 suggests that alternatives to traditional litigation be considered to aid settlement,<sup>46</sup> stating: "The participants at any conference under this rule *may consider* and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . . and (10) such other matters as may aid in the disposition of the action."<sup>47</sup> The report concluded that Rules 1 and 16 encourage the development and utilization of settlement tools such as SJT. Judge Lambros further noted that the creation of SJT was spurred in part by Rule 39(c)'s express provision for an advisory jury to assist judges in rendering decisions.<sup>48</sup>

Lastly, Judge Lambros added that Rule 83 allows district courts to regulate their caseload in any manner not inconsistent with the Rules,

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*Id.* at 449; see Bobby M. Harges, *The Promise of the Mandatory Summary Jury Trial*, 63 Temp. L. Rev. 799, 806-07 (1990).

Some legal commentators have suggested that the SJT judge should not participate as the trier of fact in any subsequent litigation. Menkel-Meadow, *supra* note 29, at 43. The concern is based upon the view that settlement discussions involve the revelation of information that would not be admissible during a trial and would taint any judge's determinations in subsequent litigation. *Id.* at 43 n.211. This approach fails to recognize, however, that the jury is the trier of fact in most subsequent trials. Harges, *supra*, at 810. In addition, this reasoning would lead to the untenable conclusion that no judge would be able to undertake any meaningful settlement discussions in pre-trial conferences because of impartiality concerns. *Id.*

40. Fed. R. Civ. P. 1; Lambros, *supra* note 14, at 469.

41. Lambros, *supra* note 14, at 469.

42. Fed. R. Civ. P. 16(a)(5) states: "In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as . . . [f]acilitating the settlement of the case."

43. Lambros, *supra* note 14, at 469.

44. *Id.*; see Fed. R. Civ. P. 16(a)(1).

45. Lambros, *supra* note 14, at 469; see Fed. R. Civ. P. 16(a)(5).

46. Lambros, *supra* note 14, at 469.

47. Fed. R. Civ. P. 16(c)(7), (11) (emphasis added). These provisions were amended in 1993. See *infra* note 190 and accompanying text.

48. Lambros, *supra* note 14, at 470. "In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury . . ." Fed. R. Civ. P. 39(c). *But see* Hume v. M & C Management, 129 F.R.D. 506, 508 & n.5 (N.D. Ohio 1990) (asserting that Judge Lambros' reliance on Rule 39(c) is misplaced).

further enhancing the opportunity for districts to adopt novel approaches to settlement.<sup>49</sup> However, Judge Lambros did not limit the authority to conduct SJT to the explicit language of the Rules. His report also supported SJT use under the court's inherent power to manage effectively its docket.<sup>50</sup>

### B. *Basic SJT Procedures Under the Lambros Report*

A magistrate or judge initiates SJT only after completion of the discovery process and with no motions pending.<sup>51</sup> Upon the completion of discovery, each party submits trial briefs on the legal issues and requested jury instructions.<sup>52</sup> During the pre-SJT conference, the judge works with the attorneys to narrow issues of law and fact.<sup>53</sup> Counsel objections on anticipated evidence are also dealt with at this time, since formal objections during SJT are discouraged.<sup>54</sup>

Potential jurors, drawn from the regular jury pool, complete written questionnaires to spot potential bias.<sup>55</sup> The court conducts a brief voir dire with counsel, limited to two preemptory challenges. Some judges will inform jurors of their advisory roles prior to SJT, while others do not inform them until after the verdict is rendered.<sup>56</sup>

During SJT, summary presentations of proof are made before a judge and the advisory panel of jurors.<sup>57</sup> Live testimony usually is not permitted during the half-day proceeding.<sup>58</sup> In certain instances, however, the parties have utilized videotape clips to present edited witness

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49. Lambros, *supra* note 14, at 470; *see* Fed. R. Civ. P. 83. Judge Lambros' district adopted a local rule that allowed judges to exercise their discretion in utilizing SJT. Lambros, *supra* note 14, at 470.

50. *Id.* *See also infra* notes 167-85 and accompanying text (discussing the discretion that Rule 16 grants courts in managing their dockets).

51. Lambros, *supra* note 14, at 470. Nearly 80% of all legal fees are amassed during discovery. Galen, *supra* note 1, at 64. SJT often is criticized because it does not help to reduce the parties' greatest expenses, which are incurred during the discovery process. Therefore, SJT's real cost-reductions are derived primarily from limiting the public and private costs of a trial.

52. Lambros, *supra* note 14, at 470.

53. *Id.* at 470-71.

54. *Id.*; *see infra* notes 90-92 and accompanying text.

55. Lambros, *supra* note 14, at 470-71; *see* Leeson & Johnston, *supra* note 6, at 23-24. The report emphasizes that the SJT makes more cost-effective use of jurors by paying them for shorter periods of service and recycling jurors paid to appear but not selected for formal trials. Lambros, *supra* note 14, at 473.

56. *See infra* notes 111-14 and accompanying text. A survey of Florida attorneys who utilized a state court SJT program suggested that jurors were less likely to take their roles seriously if told their verdict was not binding. Alfini, *supra* note 27, at 217. This survey data was limited to about 75 attorney respondents and did not take into account juror perceptions. *Id.* at 215 & n.10.

57. Lambros, *supra* note 14, at 471. SJT juries may involve 6 or 12 jurors, but the number of jurors usually is 6. Leeson & Johnston, *supra* note 6, at 23.

58. Lambros, *supra* note 14, at 471.

testimony.<sup>59</sup> Most often, attorneys summarize anticipated testimony and are free to present exhibits to the jury. Attorneys are limited to evidence normally admissible at trial, with any representations to be supported by discovered materials.<sup>60</sup> Parties or representatives with settlement authority must be present during these presentations to maximize chances for settlement.<sup>61</sup>

After the presentations, the judge provides the jury with an abbreviated charge on the applicable law. The jury then deliberates and returns with either consensus or separate advisory verdicts on party liability and damages.<sup>62</sup> After the verdict, the jurors remain for a further question-and-answer period with the parties and their lawyers. At this stage, the jury helps the disputants to assess their chances for success at trial. Each party probes the jurors' perceptions to determine the strengths and weaknesses of each side's case. It is anticipated that the advisory verdict and the question-and-answer period will spur settlement talks between the parties, which normally are mediated by the SJT judge.<sup>63</sup>

During these negotiations, the disputants have the opportunity to fashion more creative solutions than those that courts have authority to award. The responsibility to resolve the dispute is placed back into the hands of the parties.<sup>64</sup> If negotiations fail, the parties can

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59. Alfani, *supra* note 27, at 217; Harges, *supra* note 39, at 806; Thomas B. Metzloff, *Reconfiguring the Summary Jury Trial*, 41 Duke L.J. 806, 830, 859 (1992) [hereinafter referred to in text as the "Metzloff study"]. In its discretion, the court may allow the parties to utilize videotape testimony rather than attorney summaries of testimony. Harges, *supra* note 39, at 806; Metzloff, *supra*, at 859. In *Stites v. Sundstrand Heat Transfer, Inc.*, 660 F. Supp. 1516 (W.D. Mich. 1987), videotape clips were utilized to allow the jurors to view and listen briefly to party and expert witness testimony. The National Institute for Dispute Resolution has developed an excellent 41 minute videotape on the *Stites* SJT, which presents an actual SJT, provides juror, lawyer, and judicial perspectives on SJT, and illustrates its use of videotape testimony. The videotape is entitled: Dispute Resolution and the Courts, Summary Jury Trial (National Institute for Dispute Resolution 1988).

60. Lambros, *supra* note 14, at 471; see *infra* notes 90-93 and accompanying text.

61. Leeson & Johnston, *supra* note 6, at 23, 25; Lambros, *supra* note 14, at 470.

62. Lambros, *supra* note 14, at 471; see *infra* notes 94-96 and accompanying text.

63. Leeson & Johnston, *supra* note 6, at 23-25; Lambros, *supra* note 14, at 469, 471.

64. Note, *Mandatory Mediation and Summary Jury Trial*, *supra* note 7, at 1092.

In contrast to the adversarial system, which selects one party as the "winner" and the other as the "loser," consensus-based ADR allows both parties to view themselves as winners. In both mediation and SJT, parties, with or without the aid of a neutral party, invent options for mutual gain by making concessions on issues that they discount in order to gain ground on issues they view as most important. In so doing, parties often reach a mutually beneficial solution. The integrative bargaining that consensual ADR promotes allows parties to discover creative solutions that they might never have considered in litigation.

*Id.* (footnotes omitted); see Leeson & Johnston, *supra* note 6, at 3, 105-07.

follow the normal track of litigation, seeking a new, full trial on the merits.<sup>65</sup>

### C. Main Criticisms of SJT Process

Judges, lawyers, and scholars initially applauded Judge Lambros' creativity in inventing SJT, but criticisms began to surface a few years later. The Seventh Circuit's Judge Richard A. Posner voiced the earliest doubts about both the usefulness and ethics of SJT.<sup>66</sup> Other legal commentators soon followed with a barrage of criticisms.<sup>67</sup>

One of Judge Posner's main concerns was the lack of serious research to support objectively the purported savings in time and money of SJT and other ADR mechanisms.<sup>68</sup> Judge Posner believed that proponents made too many sweeping, unsupported conclusions about SJT in the absence of solid empirical data.<sup>69</sup> In his own admittedly "crude" study, Judge Posner compared settlement rates between various federal district court cases in the Sixth Circuit.<sup>70</sup> In the study, Judge Lambros' own district, which heavily utilized SJT, had settlement times that were actually lengthier than those in another district

65. Leeson & Johnston, *supra* note 6, at 24; Lambros, *supra* note 14, at 469, 471; see *infra* notes 158-66, 181-83 and accompanying text.

66. Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. Chi. L. Rev. 366 (1986).

67. See *infra* notes 75-114 and accompanying text.

68. Posner, *supra* note 66, at 367. Some commentators indicate that SJT demands a great deal of time, cost, and effort from the courts and the parties. If the matter is not settled, SJT becomes another added and costly step in the litigation process. *In re NLO, Inc.*, 5 F.3d 154, 158 (6th Cir. 1993); Wiegand, *supra* note 3, at 101-02; Jennifer O'Hearne, Comment, *Compelled Participation in Innovative Pretrial Proceedings*, 84 Nw. U. L. Rev. 290, 319-20 (1989).

Requiring participation in a pre-trial conference, even if settlement is explored, is permitted under Rule 16(a), and justifiably so, for it may facilitate settlement at very little expense to the parties and the court. A jury trial, even one of summary nature, however, requires at minimum the time-consuming process of assembling a panel and (one would hope) thorough preparation for argument by counsel, no matter how brief the actual proceeding. Compelling an unwilling litigant to undergo this process improperly interposes the tribunal into the normal adversarial course of litigation.

*In re NLO*, 5 F.3d at 158. But see *supra* notes 30-39 and accompanying text.

69. Judge Posner asserted:

I am unconvinced by anecdotes, glowing testimonials, confident assertions, appeals to intuition. Lawyers, including judges and law professors, have been lazy about subjecting their hunches—which in honesty we should admit are often little better than prejudices—to systematic empirical testing. . . . Not that the authors of these articles and opinions must be wrong on any of these assertions; they may be right on all. But they have only impressions; they have no verified knowledge. If we are to experiment with alternatives to trials, let us really experiment; let us propose testable hypotheses, and test them.

Posner, *supra* note 66, at 367 (footnote omitted).

70. Judge Posner compared settlement rates between the Northern (Judge Lambros's district), Southern, and non-Northern District cases in the Sixth Circuit. *Id.* at 377-81.

with significantly less SJT use.<sup>71</sup> Judge Posner summarized that these results did not clearly substantiate the claims that SJT increases judicial efficiency and reduces litigation costs. However, Judge Posner did emphasize the crudeness of his study and added that his study did not show SJT to be a failure either.<sup>72</sup>

The judge concluded that these results pointed to the need for more empirical studies to determine the effectiveness of SJT.<sup>73</sup> As with other ADR mechanisms, few legal scholars have answered this call for solid scientific research on SJT efficiency, in part because continuing ADR flexibility and innovation make it difficult to evaluate the process effectively.<sup>74</sup> Two recent systematic studies on SJT, both limited in scope, produced mixed results on the time and cost savings of SJT.

Professor James J. Alfini undertook two parallel studies of SJT use in Florida, based on data collected from court records, questionnaire surveys, and interviews with participating SJT attorneys.<sup>75</sup> The Alfini

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71. Although the Northern District utilized SJT 10 times more than the Southern district, settlement times were actually shorter in the Southern District (7.6 months) than in the Northern District (7.8 months) from 1981 to 1985. *Id.* at 377, 379-80. Non-Northern District settlement times were only slightly higher than the Northern District settlement times (8 months). *Id.* at 380.

72. *Id.* at 382.

73. *Id.* Even SJT proponents recognize the lack of scientific data on the effectiveness of SJTs. Menkel-Meadow, *supra* note 29, at 43-44. As District Judge Bertelsman stated in the *McKay* decision:

Why not let these judges continue to give them a try, as we have been doing and as has been endorsed by the Judicial Conference? If the procedure is ineffective and wastes time, we may expect it to be abandoned, since most federal trial judges are not profligate of their time.

It is true that to date we have only unscientific anecdotal evidence of the effectiveness of summary jury trials. But not everything in life can be scientifically verified. I have only unscientific anecdotal evidence that Hawaii is more beautiful than Covington, but I intent to expend a considerable sum to go there as soon as I get the chance.

But let's not smother a promising infant in the cradle . . .

*McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 49-50 (E.D. Ky. 1988). Judge Bertelsman further argued that the controlled experiment sought by Judge Posner may only yield the demanded scientific results if SJTs are conducted on a mandatory basis. *Id.* at 49.

74. As learned at a recent ADR conference, research on ADR effectiveness continues to defy clear evaluation.

Clearly, one of the central lessons of research on ADR is that program design and locality affect the impact ADR has on case duration, costs, and settlement. That is, not all arbitration, mediation or neutral evaluation programs are alike, and local circumstances ranging from "legal culture" to court rules may have a substantial impact on a program's effectiveness . . . One of the basic lessons of the Orlando conference was that we know that ADR works in general, but we do not know whether a given ADR program will work in a given situation . . . We have much to learn before we know exactly how to maximize the effectiveness of court-connected ADR.

Craig McEwen, *State Justice Institute Conference Examines Research on Court-Connected ADR*, Disp. Resol. Mag., Spring 1994, at 7; see Menkel-Meadow, *supra* note 29, at 9; Metzloff, *supra* note 59, at 821-24 & n.53.

75. Alfini, *supra* note 27, at 214-15; see also M. Daniel Jacobovitch & Carl M. Moore, *Summary Jury Trials in the Northern District of Ohio*, 1982 Fed. Jud. Center

study compared attorney perceptions of SJT utilized under a voluntary state program with those of a mandatory federal program in the same state.<sup>76</sup> Most of the state lawyers indicated that they spent fewer billable hours on the case<sup>77</sup> and achieved Judge Lambros' model of a half-day proceeding.<sup>78</sup> In contrast, a majority of the federal lawyers asserted that their billable hours increased, thereby calling into question SJT time and cost savings.<sup>79</sup> Also, few federal SJT cases were completed within the half-day goal.<sup>80</sup>

The time and cost differences were largely attributed to (1) the complexity of the federal cases, which involved multiple parties and more intricate issues of law and fact, (2) the substantial completion of the expensive discovery process, and (3) the need for more lengthy post-SJT settlement negotiations.<sup>81</sup> Nonetheless, the scheduling of an SJT date resulted in a higher percentage of federal cases being settled prior to SJT, illustrating that setting a mandatory SJT date accelerated the settlement process.<sup>82</sup>

Subsequent to the Alfini study, Professor Thomas B. Metzloff conducted a study of SJT use in North Carolina under a voluntary state program, reviewing case histories from 1987-91 and undertaking in-depth interviews with participating judges and attorneys.<sup>83</sup> The Met-

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Rep. 1 (reporting general survey on SJT use that found overall satisfaction with process, but substantial dissent on procedure); Alfini, *supra* note 27, at n.8 (commenting on various studies of SJTs); Metzloff, *supra* note 59, at 821 nn.53 & 59 (same).

76. Alfini, *supra* note 27, at 214-15. The Alfini study considered 43 state SJT cases and 51 federal SJT cases. *Id.* at 215. The Alfini study considered at least one lawyer's perceptions in about 42 state SJT cases and 40 federal SJT cases. *Id.* at 215 & n.10. Most of the state cases involved personal injury disputes. *Id.* at 221.

77. *Id.* at 230-31. Some 16% indicated that their billable hours increased, while about 6% believed that their billable time remained the same. *Id.* at 231.

78. *Id.* at 229. In the Alfini study, most state SJT cases were completed in the half-day format, with 86% completed within 4 or less hours, 10% completed within 5-8 hours, only 2% taking 9 or more hours, and only 2% requiring 16 or more hours. *Id.*

79. *Id.* at 230-31. About 57% claimed their billable hours increased, 30% stated billable hours decreased and 13% believed that the hours remained the same. *Id.* at 231.

80. *Id.* at 229. In federal SJT cases, only 8% were completed within the half-day time period. *Id.* About 33% were completed within 5-8 hours and 42% within 9-16 hours. *Id.* About 17% took more than 16 hours to complete. *Id.*

81. *Id.* at 219, 231-32.

82. *Id.* at 221-22. The Alfini study found that under the state voluntary program, 2% of the cases settled prior to SJT and 20% decided to forego SJT. *Id.* at 221. Under the mandatory federal program, about 24% of the scheduled SJT cases settled before trial. *Id.*

83. Metzloff, *supra* note 59, at 826-29. Of the 17 cases analyzed, the author noted that 11 cases involved assessments of damages, 4 focused on party liability, and 2 concerned determinations of alleged contributory negligence. *Id.* at 826-27.

Professor Metzloff indicated that this small number of cases over a five-year period resulted in only about four SJTs being held each year. *Id.* at 836. This limited use did little to alleviate state court backlogs. *Id.* Professor Metzloff hypothesized that a number of factors might explain the sparse use of SJT, including the lack of attorney familiarity with SJT and the absence of a mandatory policy for case referral to SJT. *Id.* at 837.

zloff study determined that SJT cases were resolved in a time period seventy-five percent shorter than cases processed through standard litigation.<sup>84</sup> The Metzloff study also found that most attorneys reported cost savings due primarily to shortened trial times.<sup>85</sup> No significant cost savings in case preparation or the discovery process were realized.<sup>86</sup>

The criticism of SJT is not limited to issues of time and cost. Critics assert that SJT procedures may not accurately predict actual trial outcomes and thus may prevent parties from properly assessing their cases.<sup>87</sup> SJT departs from typical trial procedures in several important ways. First, summary presentations and the lack of live witness testimony may skew juror case impressions<sup>88</sup> and prevent meaningful juror assessments of witness credibility.<sup>89</sup>

Second, the relaxed evidentiary procedures, coupled with summary presentations, may overemphasize each attorney's advocacy style and personality.<sup>90</sup> These aspects of SJT may encourage lawyer gamesmanship,<sup>91</sup> such as attempts to present inadmissible evidence,<sup>92</sup> to gather

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84. *Id.* at 832.

85. *Id.* at 835. For example, several cases expected to absorb 2-3 weeks of court time at trial were either settled during SJT or completed in only 14-18 hours. *Id.* at 829.

86. *Id.* at 835-36.

87. Brunet, *supra* note 34, at 39-40; Webber, *supra* note 2, at 1515-17; Wiegand, *supra* note 3, at 99-100.

Also, in the Alfini study, approximately 64% of the state lawyers and 53% of the federal lawyers considered the SJT verdict to reflect true trial results. Although a majority of the attorneys in both court systems found the verdicts to be appropriate, substantial percentages believed that the verdict was either too low or too high. These mixed results again cast doubt on the predictive value of SJT. Alfini, *supra* note 27, at 228-29.

88. Joan K.A. Rowland, Comment, *Communication and Psychology Variables: Reasons to Reject the Summary Jury Trial as an Alternate Dispute Resolution Technique*, 39 Kan. L. Rev. 1071, 1071 (1991). Rowland notes that the application of empirical research on persuasive communication and psychological stimuli suggests that SJT substantially alters normal juror evaluations found in a full trial. *Id.* at 1087-1102. Rowland indicates that SJT procedures erode juror processing of case information and juror analysis of witness veracity and interaction—important bases for juror decision-making in an actual trial. *Id.* at 1082-85, 1101. Furthermore, she asserts that the different communication and psychological factors found in SJT summary presentations will overemphasize attorney strategy and advocacy skills. *Id.* at 1088-91, 1100-01. In particular, the compressed format favors the plaintiff-attorney's framing of the issues and unfairly shapes jury interpretations of subsequent evidence. *Id.* at 1095. Without strong data to support the use of SJT, Rowland recommends that the process not be widely adopted until these communication and psychological variables can be fully understood. *Id.* at 1101-02.

89. See Brunet, *supra* note 34, at 40; Webber, *supra* note 2, at 1516; Wiegand, *supra* note 3, at 99.

90. As Judge Posner cautioned, "We do not need a jury of laymen to decide which of two lawyers is more credible." Posner, *supra* note 66, at 374; see *supra* notes 88-89 and accompanying text.

91. Posner, *supra* note 66, at 374; O'Hearne, *supra* note 68, at 319-20; see Robert E. Keeton, *Times Are Changing For Trials in Court*, 21 Fla. St. U. L. Rev. 1, 15-17

information that should have been requested during discovery, or to learn about opposing counsel's trial strategy and other work product.<sup>93</sup>

Several oft-cited SJT cases support these concerns about the predictive value of SJT. For example, SJT judges have divided mock juries into two separate groups to deliberate after hearing the same SJT presentations. In these cases, the separate juries came back with opposing verdicts despite hearing the same evidence.<sup>94</sup> In another case, the actual trial jury's award was nearly nine times the amount rendered by the SJT jury.<sup>95</sup> Contrary to Lambros Report assertions, these divergent results call into question the predictive value of SJT.<sup>96</sup>

The Alfini study suggests, however, that a majority of both state and federal lawyers believe that SJT is reflective of potential juror verdicts.<sup>97</sup> Approximately sixty-four percent of state lawyers and fifty-three percent of federal lawyers consider the SJT verdict to reflect true trial results.<sup>98</sup> As a predictor of settlement amounts, the av-

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(1993) (cautioning against excessive advocacy that turns lawyers into "Rambo litigators" and moves courts toward "Terminator judges").

In the Alfini study, several attorneys in federal cases asserted that, in complex cases with uncooperative counsel, SJT "merely added another layer of gamesmanship." Alfini, *supra* note 27, at 220 (quoting anonymous attorney questionnaire #13523-311).

92. Since objections are discouraged during SJT, an attorney may try to abuse the process to introduce clearly inadmissible evidence.

The inability to object . . . gave the plaintiffs carte blanche to present whatever arguments and versions of the facts they chose, regardless of whether they would have been admissible at trial. Plaintiffs' [presentation] bore no resemblance to courtroom testimony. They had the look and tone of investigative journalism and concentrated on creating emotion rather than addressing the facts. . . . Rebuttal time also gave the plaintiffs . . . an obvious advantage, since they could have the last word without fear of objection or surrebuttal.

Webber, *supra* note 2, at 1516 (citing Clifford J. Zatz, *Summary Jury Trial: The Settlement of a Toxic Tort Case*, 2 Toxics L. Rep. 929, 933-34 (1988)).

93. *Strandell v. Jackson County*, 838 F.2d 884, 888 (7th Cir. 1988); Metzloff, *supra* note 59, at 812-13. Several judges and legal commentators have questioned these concerns about surprise information or attorney work product by asserting that proper judicial vigilance during discovery under the Rules serves to prevent "[t]rial by ambush." *Federal Reserve Bank v. Carey-Canada, Inc.*, 123 F.R.D. 603, 606 (D. Minn. 1988); *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 48 (E.D. Ky. 1988); Harges, *supra* note 39, at 808-09; Spiegel, *supra* note 38, at 835.

94. *Stites v. Sundstrand Heat Transfer, Inc.*, 660 F. Supp. 1516, 1518 (W.D. Mich. 1987) (toxic tort case in which one jury found for plaintiffs for \$2.8 million and second jury found for defendant); *Muehler v. Land O'Lakes, Inc.*, 617 F. Supp. 1370, 1372 (D. Minn. 1985) (SJT case in which one jury awarded more than \$2 million to plaintiffs, while another found for defendant); see Metzloff, *supra* note 59, at 818 n.43; Wiegand, *supra* note 3, at 100 & n.99.

95. *Compressed Gas Corp. v. United States Steel Corp.*, 857 F.2d 346 (6th Cir. 1988), cert. denied, 490 U.S. 1006 (1989). The SJT jury found for the plaintiffs in the amount of \$200,000, while the ultimate trial jury found for the plaintiffs at \$1.7 million. See Metzloff, *supra* note 59, at 818 n.43; Wiegand, *supra* note 3, at 100 n.99.

96. Posner, *supra* note 66, at 374; Wiegand, *supra* note 3, at 100.

97. Alfini, *supra* note 27, at 228.

98. *Id.*



erage SJT verdicts came within the dollar range of the average settlement offers that the parties had put on the table prior to SJT.<sup>99</sup>

Some judges and scholars also have questioned whether, when mandating ADR mechanisms, the courts are focusing on court-centered efficiency at the expense of party-centered interests.<sup>100</sup> These critics are concerned that mandatory SJT may lead to "judicial high-handedness"<sup>101</sup> and coercive pressure on unwilling parties to settle cases.<sup>102</sup>

The research supports the concept that the consent of the parties to SJT may play an important role in party perceptions of fairness and satisfaction with the process. The Metzloff study indicated that, overall, jurors, attorneys and their clients, and judges were pleased with the voluntary SJT process.<sup>103</sup> This level of satisfaction may be based on the program's voluntary approach as well as the participants' opportunity to tailor SJT procedures to their disputes.<sup>104</sup>

In the Alfini study, approximately ninety-one percent of state lawyers in the voluntary program found the SJT procedure to be adequate.<sup>105</sup> Of the federal lawyers in the mandatory program, only fifty-one percent found SJT to be an adequate procedure.<sup>106</sup> In addition, reported client satisfaction ran significantly higher in the state program than in the federal process.<sup>107</sup> The Alfini study attributed some of these perceptual differences to the consensual nature of the state program and the importance of party attitude towards the process.<sup>108</sup>

Concerns also have been raised about the composition of and the legal authority for assembling SJT jurors. One concern is that the truncated voir dire of potential jurors may not adequately screen for bias.<sup>109</sup> Also, in Judge Lambros' own region, two federal district court

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99. *Id.* at 227-28. The state verdicts were much closer to the midpoint of the pre-SJT settlement offers than were the federal SJT verdicts. *Id.* at 228.

In the Metzloff study, it is also interesting to note that, in a majority of cases, the parties entered into binding SJT with settlement limited to agreed upon "high-low" parameters. Metzloff, *supra* note 59, at 830.

100. See *In re NLO, Inc.*, 5 F.3d 154, 158 (6th Cir. 1993); *Strandell v. Jackson County*, 838 F.2d 884, 887-88 (7th Cir. 1987); Menkel-Meadow, *supra* note 29, at 10-12, 18-21; Vidmar & Rice, *supra* note 29, at 97-98.

101. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 657 (7th Cir. 1989) (Posner, J., dissenting).

102. *Id.* at 657-58 (Posner, J., dissenting); Menkel-Meadow, *supra* note 29, at 11-12, 24; Vidmar & Rice, *supra* note 29, at 97; Webber, *supra* note 2, at 1517-18.

103. Metzloff, *supra* note 59, at 834.

104. See *id.* at 830; Vidmar & Rice, *supra* note 29, at 98-102 (suggesting use of voluntary, binding Jury-Determined Settlement process that allows for greater party design and control of process, including high-low award parameters).

105. Alfini, *supra* note 27, at 230.

106. *Id.* Many of the federal lawyers expressed the concern that, due to case complexities, they need a great deal more time to adequately present their cases. *Id.* at 219.

107. *Id.* at 232-33. Client satisfaction was 89% for the state program and 51% for the federal program. *Id.*

108. *Id.* at 233-34; see Menkel-Meadow, *supra* note 29, at 18-25.

109. Webber, *supra* note 2, at 1517.

judges challenged the courts' statutory authority to utilize jurors from the trial pool for SJT. Each judge, narrowly interpreting statutory law, asserted that the federal courts lack statutory authority to require jurors to participate in an advisory fashion.<sup>110</sup>

From an ethical perspective, SJT is criticized in cases in which jurors are not advised that their verdict is nonbinding. Most notably, Judge Posner questioned the ethics of withholding this information:

Never telling the jury worries me . . . . Telling the jurors after they have delivered the summary verdict that the verdict is not legally binding is only a partial anodyne for my concern . . . . The jurors are still being fooled; and they are learning that juries sometimes make decisions and at other times simply referee fake trials. As word spreads, the conscientiousness of jurors could decline; it is almost a detail that the utility of the summary jury trial would also decline.<sup>111</sup>

Judges can avoid this ethical problem by informing jurors of their nonbinding role from the start,<sup>112</sup> but this openness may lessen juror attention and seriousness in SJT. In the Alfini study, attorneys asserted that not telling the jurors until after SJT is complete is important to help maintain responsible juror determinations.<sup>113</sup> This practical concern is challenged by studies that indicate that mock jurors continue to take their advisory role quite seriously in rendering non-binding verdicts.<sup>114</sup>

Currently, the debate over SJT's effectiveness is a contentious one, with opponents and supporters in a seeming deadlock of mixed evidence on both sides. Parties considering SJT need to balance the benefits outlined by SJT supporters with criticisms raised by SJT opponents. When a court orders SJT use, however, parties do not have the opportunity to weigh these factors and make a reasoned decision on their own. Without conclusive evidence of SJT as a success or failure, the battle over SJT now focuses on whether the federal courts possess the legal authority to mandate SJT without prior party approval.

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110. *United States v. Exum*, 748 F. Supp. 512, 513 (N.D. Ohio 1990); *Hume v. M & C Management*, 129 F.R.D. 506, 510 (N.D. Ohio 1990); see Wiegand, *supra* note 3, at 113.

111. Posner, *supra* note 66, at 386-87; see *Hume*, 129 F.R.D. at 508 nn.3-4; Wiegand, *supra* note 3, at 114.

112. Posner, *supra* note 66, at 386; see Spiegel, *supra* note 38, at 829-30.

113. Alfini, *supra* note 27, at 217.

114. Harges, *supra* note 39, at 809-10. The author states:

Several studies have examined the level of emotional involvement of mock jurors who are aware of the hypothetical nature of their deliberations. The studies report that mock jury verdicts may be highly predictive of actual trial verdicts and that mock jurors show a high degree of emotional involvement in their work.

*Id.* at 809 (footnotes omitted).

## II. COURT BATTLES OVER MANDATORY SJT

Judge Lambros anticipated that SJT participation would be voluntary.<sup>115</sup> The Sixth and Seventh Circuits accept only voluntary SJT, asserting that mandatory SJT is allowed neither under the Rules nor as a result of courts' authority to manage their dockets.<sup>116</sup> But in an effort to deal with burgeoning caseloads, some federal courts have approved compulsory SJT use, without the parties' mutual agreement, based on the Rules and the courts' inherent authority.<sup>117</sup> Differing court views hinge primarily on the interpretation of the explicit language of Rule 16 and its underlying policies as stated in the notes of the advisory committee.<sup>118</sup>

A. *Interpreting Rule 16*

The Seventh Circuit case of *Strandell v. Jackson County*<sup>119</sup> involved the first federal court to sound a sour note on mandatory SJT. This civil rights action arose from the alleged arrest, strip search, imprisonment, and suicidal death of Michael Strandell.<sup>120</sup> After the close of discovery, the defendants filed a motion to compel the production of copies of witnesses' statements obtained by the plaintiffs.<sup>121</sup> Plaintiffs argued that these materials were privileged attorney work-product that the defendants should have requested during the discovery phase.<sup>122</sup> The court denied the defendants' motion.<sup>123</sup>

The trial court suggested that the parties utilize SJT to resolve the matter, in light of the court's crowded docket.<sup>124</sup> Citing attorney

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115. Judge Lambros' report referred to SJT as "a noncoercive, 'no-lose' alternative." Lambros, *supra* note 14, at 477. Professor Alfini's study suggests that the "no-risk" assertion of SJT may not be accurate in all situations. "In cases where defendants have an offer on the table, plaintiffs might experience a considerable setback with a no-liability SJT award." Alfini, *supra* note 27, at 225.

116. See *infra* notes 117-42 and accompanying text. For articles opposing mandatory SJT, see Metzloff, *supra* note 57; Posner, *supra* note 66; Vidmar & Rice, *supra* note 29; Webber, *supra* note 2; Wiegand, *supra* note 3; O'Hearne, *supra* note 68.

117. See *infra* notes 167-85 and accompanying text. For articles favoring mandatory SJT, see Menkel-Meadow, *supra* note 29; Spiegel, *supra* note 38; William E. Craco, Note, *Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation*, 57 Fordham L. Rev. 483 (1988); Anne C. Morgan, Note, *Thwarting Judicial Power to Order Summary Jury Trials in Federal District Court: Strandell v. Jackson County*, 40 Case W. Res. L. Rev. 491 (1989-1990); Note, *Mandatory Mediation and Summary Jury Trial*, *supra* note 7.

118. See *infra* notes 119-85 and accompanying text. Great weight is given to the Committee's construction of the meaning of the Rules. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

119. 838 F.2d 884 (7th Cir. 1987); see Morgan, *supra* note 117 (providing critical review of the *Strandell* decision).

120. 838 F.2d at 884. The parents of Michael Strandell brought the action seeking \$500,000 in damages. *Id.*

121. *Id.* at 885.

122. *Id.*

123. *Id.*

124. *Id.*

work-product concerns, the plaintiffs rebuffed the court's recommendation of SJT use and indicated their readiness for an immediate trial.<sup>125</sup> The district court ordered SJT as authorized under Rule 16, even though there was no local rule permitting its utilization.<sup>126</sup> The plaintiffs again refused, and the district court found the plaintiffs in criminal contempt.<sup>127</sup> On appeal, the Seventh Circuit rejected the notion of mandatory SJT.<sup>128</sup>

The *Strandell* decision was followed in 1993 by the Sixth Circuit case, *In re NLO, Inc.*<sup>129</sup> This case involved employees and subcontractors suing the owners of a uranium processing facility for intentionally or negligently exposing them to radioactive and hazardous materials.<sup>130</sup> The district court mandated SJT and took the unusual step of ordering the process to be open to the public.<sup>131</sup> The district court supported its order under Rule 16; as in *Strandell*, there was no local rule in effect to allow for SJT use.<sup>132</sup> Relying heavily on the Seventh Circuit's reasoning in *Strandell*, the Sixth Circuit rejected the concept of mandatory SJT.<sup>133</sup>

In reaching their decisions, both the *Strandell* and *In re NLO* courts narrowly construed the language and objectives of Rule 16.<sup>134</sup> Each court viewed the rule as limiting the federal court's express and inherent authority, rather than inviting judicial activism and innovation.<sup>135</sup>

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125. *Id.*

126. *Id.* at 885-86. *But see* Hume v. M & C Management, 129 F.R.D. 506, 508 n.3 (N.D. Ohio 1990) (rejecting, in dicta, Rule 16 basis for SJT).

127. *Strandell*, 838 F.2d at 885. Despite the clear potential for SJT abuse, the judge's order in *Strandell* provides a good example of unfair pressure on a party to participate in SJT. *See* Harges, *supra* note 39, at 808-09; Menkel-Meadow, *supra* note 29, at 19-20.

128. *Strandell*, 838 F.2d at 888. In addition, the Rule 16 debate spilled over into concerns about the protection of attorney work-product and trial strategy and the overall fairness and effectiveness of SJT. *Id.*

129. 5 F.3d 154 (6th Cir. 1993).

130. *Id.* at 155. The plaintiffs claimed that this exposure to hazardous levels of radioactivity increased their risk of cancer and caused emotional distress. *Id.* The plaintiffs sought compensatory and punitive damages, costs for a court-supervised medical monitoring program, and attorneys' fees with interest. *Id.*

131. *Id.*; *see supra* note 35 and accompanying text.

132. 5 F.3d at 156-57. The defendant filed a petition for mandamus, and an emergency stay was granted and oral argument scheduled. *Id.* at 155. In the earlier case of *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900 (6th Cir. 1988), the Sixth Circuit's dicta clearly supported the implementation of SJT under both Rule 16 and the court's inherent authority. *Id.* at 903 n.4. However, the Sixth Circuit later distinguished this case on the grounds that the parties consented to SJT in *Cincinnati Gas. In re NLO, Inc.*, 5 F.3d 154, 156-57 (6th Cir. 1993).

133. *In re NLO*, 5 F.3d at 157.

134. *Id.* at 157-58; *Strandell*, 838 F. 2d at 886-87.

135. *In re NLO*, 5 F.3d at 157-58; *Strandell v. Jackson County*, 838 F.2d 884, 886-87 (7th Cir. 1987). Both courts of appeals also rejected the argument that mandatory SJT was within the court's inherent authority to manage its docket. 5 F.3d at 158; 838 F.2d at 886-87.

In rejecting mandatory SJT, several basic arguments surfaced from these courts' interpretations of Rule 16.

First, both circuits strictly interpreted Rule 16 to authorize mandatory pre-trial conferences, but not mandatory SJT.<sup>136</sup> Under the terms of Rule 16(a), a court may compel parties to attend a pre-trial conference that may aid settlement.<sup>137</sup> Each court considered a mandatory pre-trial conference to be a neutral forum for fostering settlement and a normal step in the trial process.<sup>138</sup> On the other hand, these opinions viewed SJT as a coercive session that would force "an unwilling litigant [to] be sidetracked from the normal course of litigation."<sup>139</sup>

These decisions also reasoned that Rule 16(c)(7) expressly states that the parties *may consider* extrajudicial alternatives to dispute resolution during a pre-trial conference.<sup>140</sup> The courts pointed to the advisory committee's notes to support the noncoercive nature of ADR use under Rule 16(c)(7).<sup>141</sup> "In addition to settlement, Rule 16(c)(7) refers to *exploring* the use of procedures other than litigation to resolve the dispute. This includes *urging* the litigants to employ adjudicatory techniques outside the courthouse."<sup>142</sup>

The Sixth and Seventh Circuits concluded that this permissive language provided guidance on topics that parties may discuss, but did not force them to use extrajudicial methods such as SJT.<sup>143</sup> The courts also assumed that SJT imposed settlement on the parties, inconsistent with the noncoercive policies behind Rule 16.<sup>144</sup> This firm rejection of compulsory SJT under narrow readings of Rule 16 and the courts' inherent authority, however, is inconsistent with other Sixth and Seventh Circuit rulings.

For example, after *Strandell*, the Seventh Circuit deviated from the express language of Rule 16 regarding compelled attendance at a pre-trial conference of represented parties in *G. Heileman Brewing Co. v.*

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136. *In re NLO*, 5 F.3d at 157-58; *Strandell*, 838 F.2d at 887-88.

137. *In re NLO*, 5 F.3d at 157; *Strandell*, 838 F.2d at 887.

138. *In re NLO*, 5 F.3d at 157-58; *Strandell*, 838 F.2d at 887; see Fed. R. Civ. P. 16(c)(7) (amended 1993) advisory committee's note.

139. *Strandell*, 838 F.2d at 887; see *In re NLO*, 5 F.3d at 157.

140. *In re NLO*, 5 F.3d at 157; *Strandell*, 838 F.2d at 887. "The participants at any conference under this rule may consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." Fed. R. Civ. P. 16(c)(7) (amended 1993).

141. *In re NLO*, 5 F.3d at 157; *Strandell*, 838 F.2d at 887.

142. Fed. R. Civ. P. 16(c)(7) (amended 1993) advisory committee's note (emphasis added).

143. *In re NLO*, 5 F.3d at 157; *Strandell*, 838 F.2d at 887.

144. See *In re NLO*, 5 F.3d at 157-58; *Strandell*, 838 F.2d at 887. "Rule 16 . . . was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise." 838 F.2d at 887 (quoting *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985)).

*Joseph Oat Corp.*<sup>145</sup> The case involved a contract dispute between two companies over a waste water mechanism for use in a treatment plant.<sup>146</sup> The district court ordered the defendant to appear at a pre-trial conference with a corporate representative with settlement authority,<sup>147</sup> even though the explicit language of Rule 16 requires only attorneys and unrepresented parties to attend a pre-trial conference.<sup>148</sup> At the conference, defendant's counsel and another attorney, authorized to speak on behalf of the corporate principals, appeared, but no principal or corporate representative attended.<sup>149</sup> Citing Rule 16, the district court penalized the defendant costs and attorneys' fees for failing to obey its order.<sup>150</sup>

On appeal, a deeply divided court<sup>151</sup> held that, despite the express language of Rule 16, judges have the authority to compel represented litigants to participate in a pre-trial conference.<sup>152</sup> Relying heavily on the Supreme Court case of *Link v. Wabash Railroad, Co.*,<sup>153</sup> the *Heileman* court acknowledged that the federal courts' procedural authority is not limited to the Rules or statutes when seeking to manage effectively their case dockets.<sup>154</sup> In contrast to *Strandell*, the court liberally construed Rule 16<sup>155</sup> as encouraging judicial innovation in light of the court's inherent authority to manage its caseload.<sup>156</sup> The court opined that

[t]his authority likewise forms the basis for continued development of procedural techniques designed to make the operation of the court more efficient, to preserve the integrity of the judicial process, and to control courts' dockets. Because the rules form and shape certain aspects of a court's inherent powers, yet allow the continued exercise of that power where discretion should be available, the mere absence of language in the federal rules specifically authorizing or describing a particular judicial procedure should not, and does not, give rise to a negative implication of prohibition.<sup>157</sup>

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145. 871 F.2d 648 (7th Cir. 1989); see Robert J. Keenan, *Rule 16 and Pre-Trial Conferences: Have We Forgotten the Most Important Ingredient?*, 63 S. Cal. L. Rev. 1449 (1990) (arguing for broader interpretation of Rule 16 as contained in the *Heileman* decision).

146. *Heileman*, 871 F.2d at 648-49.

147. *Id.* at 650.

148. *Id.* at 651. "In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial . . . ." Fed. R. Civ. P. 16(a).

149. *Heileman*, 871 F.2d at 650.

150. *Id.* Defendants were penalized \$5,860.01 for their failure to have a corporate principal attend the pre-trial conference. *Id.*

151. In a 6-5 decision, the Seventh Circuit upheld the district court's action. Five dissents were filed, including a blistering dissent from Judge Posner. *Id.* at 657-71.

152. *Id.* at 652-53.

153. 370 U.S. 626 (1962).

154. 871 F.2d at 651.

155. *Id.* at 652-53.

156. *Id.* at 651-52.

157. *Id.* (footnote omitted).

With an eye towards encouraging, but not requiring, settlement,<sup>158</sup> the *Heileman* court upheld mandatory attendance of represented litigants at pre-trial conference as consistent with both the purpose and intent of Rule 16<sup>159</sup> as well as the court's inherent authority.<sup>160</sup>

Prior to *In re NLO*, the Sixth Circuit upheld mandatory non-binding mediation as a legitimate precondition to trial in *Rhea v. Massey-Ferguson, Inc.*<sup>161</sup> The Sixth Circuit reviewed a local court rule that interposed mediation as precondition to trial, concluding that the rule did not violate the Seventh Amendment<sup>162</sup> or the Rules.<sup>163</sup> The *Rhea* court asserted that the core of the Seventh Amendment requires only that the parties have the right to have unresolved issues ultimately decided by a jury.<sup>164</sup> The decision asserted that mandatory, non-binding mediation did not violate one's right to a jury trial because the process was not considered "outcome-determinative."<sup>165</sup> In addition, the local rule was not inconsistent with the Rules because the authorized mediation process was not outcome-determinative.<sup>166</sup>

The *Strandell* and *In re NLO* courts did not perceive SJT in a similar light as other valuable settlement tools, but as a heavy-handed procedure that unfairly sidetracks litigants and coerces undesired settlements. These views of the SJT process are at odds with the non-

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158. As the *Heileman* court asserted: "We do not view 'authority to settle' as a requirement that corporate representatives must come to court willing to settle on someone else's terms, but only that they come to court in order to consider the possibility of settlement." *Id.* at 653.

Judge Posner did not accept this noncoercive interpretation of the court's decision, expressing a concern that this liberal reading would encourage "judicial high-handedness." *Id.* at 657 (Posner, J., dissenting).

159. *Id.* at 652-53.

160. *Id.* See, e.g., *Davison v. Sinai Hosp., Inc.*, 462 F. Supp. 778, 781 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980) (upholding mandatory arbitration as precondition to trial); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 577 (E.D. Pa. 1979) (same).

161. 767 F.2d 266 (6th Cir. 1985). *Rhea* was not overruled by the later *In re NLO* decision.

162. The Seventh Amendment provides in relevant part: "In suits at common law, . . . the right of trial by jury shall be preserved." U.S. Const. amend. VII.

163. *Id.* at 268-69. Local Rule 32 stated that diversity cases that involved only monetary damages may be referred to nonbinding mediation as a precondition to trial. *Id.* at 268.

164. *Id.* The court stated:

The Seventh Amendment "was designed to preserve the basic institution of the jury trial in only its most fundamental elements, not the great mass of procedural forms and details." *Galloway v. United States*, 319 U.S. 372, 392 (1943). At the core of these fundamental elements is the right to have a "jury ultimately determine the issues of fact if they cannot be settled by the parties or determined as a matter of law." *Seoane v. Ortho Pharmaceuticals Inc.*, 660 F.2d 146, 149 (5th Cir. 1981) (quoting *Woods v. Holy Cross Hospital*, 591 F.2d 1164, 1178 (5th Cir. 1979)); see also *Ex parte Peterson*, 253 U.S. 300, 310 (1920).

*Id.*

165. *Id.* at 268.

166. *Id.* at 269.

binding settlement process envisioned by Judge Lambros. Both the Sixth and Seventh Circuits seem to overlook that SJT, like mandatory pre-trial conference or mediation, does not require settlement. In fact, none of these nonbinding processes are "outcome-determinative" since they do not prevent parties from seeking a trial on the merits if negotiations are unsuccessful. Apprehension of mandatory SJT is inconsistent with support of mandatory pre-trial conferences and mediation. This sort of line-drawing between various nonbinding settlement tools seems more based in the courts' rejection of SJT as a settlement tool than in actual Rule 16 distinctions.

Several other district courts examined the same Rule 16 and arrived at opposite conclusions on mandatory SJT than did *Strandell* and *In re NLO*. District court decisions in *Arabian American Oil Co. v. Scarfone*,<sup>167</sup> *McKay v. Ashland Oil Inc.*,<sup>168</sup> and *Federal Reserve Bank v. Carey-Canada, Inc.*<sup>169</sup> support mandatory SJT under Rule 16 as well as the courts' inherent authority. Similar to the Sixth Circuit's view in *Heileman*, these district courts viewed Rule 16 as expanding judicial authority to manage caseloads and challenging courts to consider innovative dispute resolution techniques.<sup>170</sup> In light of this perspective, these courts determined that mandatory SJT is wholly consistent with the settlement goals of Rule 16.<sup>171</sup>

[I]t is difficult to reconcile the argument that Rule 16 does not permit courts to order the parties to participate in summary jury trials with the [settlement] goals of that rule. It is hard to imagine that the drafters of the 1983 amendments actually intended to strengthen courts' ability to manage caseloads while at the same time intended to deny the court the power to compel participation by the parties to the litigation.<sup>172</sup>

As further support for this view, the *Arabian American Oil* and *McKay* courts looked to the 1984 Judicial Conference resolution endorsing SJT. The resolution deleted draft language limiting SJT use to the

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167. 119 F.R.D. 448, 449 (M.D. Fla. 1988) ("This Court finds the summary trial to be a legitimate device to be used to implement the policy of this Court to provide litigants with the most expeditious and just case resolution.").

168. 120 F.R.D. 43, 44 (E.D. Ky. 1988) ("[T]he court finds itself in respectful disagreement with the Seventh Circuit on the inherent power and Federal Rules issues . . .").

169. 123 F.R.D. 603, 606 (D. Minn. 1988) ("[T]he view of the Seventh Circuit is rejected . . . [T]he parties may be compelled to participate in settlement efforts, such as the SJT.").

170. *Federal Reserve Bank*, 123 F.R.D. at 604, 606-07; *McKay*, 120 F.R.D. at 47-48; *Arabian Am. Oil*, 119 F.R.D. at 448-49.

171. *Federal Reserve Bank*, 123 F.R.D. at 606-08; *McKay*, 120 F.R.D. at 47-49; *Arabian Am. Oil*, 119 F.R.D. at 448.

172. *Federal Reserve Bank*, 123 F.R.D. at 607; *McKay*, 120 F.R.D. at 48; *Arabian Am. Oil*, 119 F.R.D. at 448.



voluntary consent of parties, assuming that compelled participation was authorized under the Rules.<sup>173</sup>

Viewing Rule 16 as a positive call to judicial innovation, these district courts concluded that mandatory SJT was within the court's inherent authority.<sup>174</sup> The *McKay* and *Federal Reserve Bank* courts pointed in part to the "outcome-determinative" test of *Rhea*.<sup>175</sup> The *McKay* court further amplified the *Rhea* approach through its analysis of the Supreme Court case of *Colgrove v. Battin*.<sup>176</sup>

In *Colgrove*, the Supreme Court reviewed a local federal court rule that reduced a civil trial jury from twelve to six.<sup>177</sup> The Court held that this change did not violate the Seventh Amendment or the Rules.<sup>178</sup> The *Colgrove* decision stated that the Constitution does not deny the courts authority to demonstrate reasonable procedural flexibility and innovation under the Rules to meet changing times.<sup>179</sup> The Court stated that "[n]ew devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. . . . [Such changes] are essential to the preservation of the right' of trial by jury."<sup>180</sup>

The Court asserted that the only limit on this exercise of authority was that the innovations should not be "outcome-determinative"; that is, they should not seriously interfere with or prevent the ultimate determination of the case by a jury.<sup>181</sup> Neither courts nor legal critics have claimed that SJT is "outcome-determinative." Since SJT is not "outcome-determinative," legal distinctions between differing forms of nonbinding pre-trial settlement tools under Rule 16 were not justified.<sup>182</sup> As the *Arabian American Oil* court explained:

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173. *Federal Reserve Bank*, 123 F.R.D. at 607; *McKay*, 120 F.R.D. at 48.

174. *Federal Reserve Bank*, 123 F.R.D. at 604; *McKay*, 120 F.R.D. at 45-46; *Arabian Am. Oil*, 119 F.R.D. at 449; see *supra* note 19 and accompanying text. See also *Twitty v. Minnesota Mining & Mfg. Co.*, 26 Phila. 92, 95 (1993) (upholding state court's inherent power to compel party attendance at nonbinding summary jury trial).

175. *Federal Reserve Bank*, 123 F.R.D. at 605; *McKay*, 120 F.R.D. at 45; see *supra* notes 161-66 and accompanying text. The court in *Arabian American Oil* based its broad reading on the court's Article III constitutional responsibility to resolve disputes within its jurisdiction. 119 F.R.D. at 449.

176. 413 U.S. 149 (1973).

177. *Id.* at 149-50.

178. *Id.* at 158.

179. *Id.* at 160-62.

180. *Id.* at 157, 162 (quoting *Ex parte Peterson*, 253 U.S. 300, 309-10 (1920)).

181. *Id.* at 157. "The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with." *Id.* at 160 n.17 (quoting *Ex parte Peterson*, 253 U.S. 300, 309-10 (1920)).

182. *Federal Reserve Bank v. Carey-Canada, Inc.*, 123 F.R.D. 603, 607 (D. Minn. 1988); *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 46, 48 (E.D. Ky. 1988); *Arabian American Oil Co. v. Scarfone*, 119 F.R.D. 448, 448 (M.D. Fla. 1988). The *McKay* decision stated:

A summary jury trial is far less intrusive into the independence of the trial lawyer or litigant than the local rules upheld by the above authorities. No

Rule 16 calls these procedures conferences, but what is in a name. The obvious purpose and aim of Rule 16 is to allow courts the discretion and processes necessary for intelligent and effective case management and disposition. Whatever the name the judge may give to these proceedings their purposes are the same and are sanctioned by Rule 16.<sup>183</sup>

Therefore, like mandatory pre-trial conferences and mediation, mandatory SJT does not deny parties any substantive rights, including the ultimate opportunity for a jury trial.<sup>184</sup> In essence, mandatory SJT is just another form of pre-trial conference or nonbinding mediation from which settlement may result, not a coercive club for imposing settlement as envisioned by *Strandell* and *In re NLO*.<sup>185</sup> Yet the divisions between the federal courts stood until recent statutory changes eroded the bases used to reject compulsory SJT.

### B. Statutory Revisions Settle SJT Debate

The case law and critics rejecting mandatory SJT relied heavily on the lack of express authority for SJT under the Rules or other statutory law. Statutory changes in the 1990s reflect the public's growing discontent with the courts and the demand for quicker, cheaper dispute resolution.

First, the enactment of the Judicial Improvements Act of 1990<sup>186</sup> (the "Act") illustrates increasing legislative demands for courts to take a more active role in streamlining case processing. The Act specifically directs federal courts to draft a civil justice expense and delay reduction plan.<sup>187</sup> In developing the plan, each district court must

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presumption of correctness attaches to the verdict of the summary jury, nor is any sanction imposed for failure to accept its advisory verdict. It is merely a useful settlement device. It may require an expenditure of time and preparation but so do pretrial orders, memoranda, conferences, marking of exhibits, etc. In no way is the summary jury trial "outcome-determinative" under the Supreme Court's *Colgrove* test.

120 F.R.D. at 46.

183. 119 F.R.D. at 448.

184. *Federal Reserve Bank*, 123 F.R.D. at 605; *McKay*, 120 F.R.D. at 46; *Arabian Am. Oil*, 119 F.R.D. at 449. The SJT actually may assist in narrowing the issues and improving preparation for a subsequent trial. See *supra* notes 167-83 and accompanying text.

185. *Federal Reserve Bank*, 123 F.R.D. at 607; *McKay*, 120 F.R.D. at 48; *Arabian Am. Oil*, 119 F.R.D. at 448; see Morgan, *supra* note 116, at 509.

186. 28 U.S.C. §§ 471-482 (1993).

187. *Id.* § 473. The pertinent section of the amended law states:

(a) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction: . . .

(6) authorization to refer appropriate cases to alternative dispute resolution programs that—

(A) have been designated for use in a district court; or

work with an advisory committee of lawyers and major litigants to develop policies for better managing the docket and reducing costs and delays.<sup>188</sup> The formulated plan should institute appropriate ADR programs. The Act specifically mentions SJT as a permissible ADR option.<sup>189</sup>

More importantly, the December 1993 amendments have diminished confusion over the meaning of Rule 16.<sup>190</sup> These changes have put much of the court debate over mandatory SJT and other forms of mandatory ADR to rest. Amended Rule 16 states:

(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . .

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule . . . .<sup>191</sup>

Although the revision to the Rule may appear to be minor,<sup>192</sup> a major clarification of the Rule's meaning comes from the advisory committee's explanatory notes that the *Strandell* and *In re NLO* courts relied upon to reject SJT. The revised drafters' notes spell out more clearly the varied types of settlement procedures that may be utilized and the court's authority to compel participation in these processes.

"Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore *possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration* that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that *may authorize use of some of these procedures even when not agreed to by the parties.*"<sup>193</sup>

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(B) the court may make available, including mediation, minitrial, and summary jury trial.

*Id.* § 473 (a)(6)(A),(B).

188. *Id.* § 478.

189. *Id.* § 473 (a)(6)(B).

190. Fed. R. Civ. P. 16. Amended Rule 16 took effect on December 1, 1993. See Joseph T. McLaughlin & Karen M. Crupi, *Development in ADR: Summary Jury Trials*, N.Y. L.J., Feb. 1, 1994, at 1 (discussing mandatory SJT based upon changes in Rule 16 notes); *Amendments to the Federal Rules of Civil Procedure*, Nat'l L.J., June 7, 1993, at S1, S5 [hereinafter *Amendments to Rules*].

191. Fed. R. Civ. P. 16(c)(9); see McLaughlin & Crupi, *supra* note 190, at 1; *Amendments to Rules*, *supra* note 190, at S3-S5.

192. This amended provision replaces former Fed. R. Civ. P. 16(c)(7), which stated that pre-trial conferences could be used to consider "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."

193. *Amendments to Rules*, *supra* note 190, at S3-S5 (quoting Fed. R. Civ. P. 16(c)(9) advisory committee's note) (emphasis added).

In contrast with the narrow interpretations in *Strandell* and *In re NLO*, the drafters' notes make it clear that Rule 16 is intended to broaden court authority to promote settlement as originally asserted in *Arabian American Oil*, *McKay*, and *Federal Reserve Bank*. The notes specifically state that mechanisms such as SJT are valid exercises of court authority to encourage settlement. Not only may courts consider SJT, but courts may compel party participation under statute, local rules or local plans.<sup>194</sup> The Rule 16 drafters' notes that the Sixth and Seventh Circuits relied upon so heavily no longer support their view. The new drafters' notes endorse the use of mandatory SJT as an acceptable settlement device, regardless of party approval. Therefore, SJT is not the unwarranted extension of judicial power previously asserted by the Sixth and Seventh Circuits.

However, the notes leave open the issue of a court's inherent authority to mandate SJT in the absence of statute or local rules.<sup>195</sup> "The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers."<sup>196</sup> Although a Supreme Court case may finally settle this issue, the new Rule 16 notes, coupled with the *Colgrove* case, suggest that innovative settlement mechanisms such as SJT are likely to be viewed as valid exercises of inherent court authority.<sup>197</sup>

### III. EXERCISE OF JUDICIAL AUTHORITY

Regardless of one's view of SJT, these recent legal revisions clearly support federal court authority to compel participation in SJT. However, these revisions do not address the manner in which judges should exercise this authority. Obviously, the indiscriminate use of SJT will not help the courts, parties, or attorneys to achieve the goals of fair, rapid, and cost-effective dispute resolution.<sup>198</sup>

#### A. Recommendations for Case Screening and Resolution

Federal courts should consider basic guidelines to aid judges in their screening and processing of cases for mandatory SJT and institute mechanisms for evaluating the effectiveness of SJT use. Any policies drafted should strive to maximize the benefits of SJT while taking into account some of the main criticisms of SJT outlined above. Some fun-

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194. See McLaughlin & Crupi, *supra* note 190, at 1.

195. *Amendments to Rules*, *supra* note 190, at S3-S5.

196. *Id.* at S3 (quoting Fed. R. Civ. P. 16(c)(9) advisory committee's note). There were no local rules or plans at issue in the *Strandell* and *In re NLO, Inc.* cases. See *supra* notes 119-44 and accompanying text.

197. McLaughlin & Crupi, *supra* note 190, at 1; see Craco, *supra* note 117, at 495-99.

198. Metzloff, *supra* note 59, at 821.

damental considerations for selecting and processing cases through mandatory SJT are as follows:

1. *Restrict SJT use to private disputes.* SJT cases should involve private disputes in which all the parties affected are before the court. Cases that involve a substantial public interest, such as the civil rights action against the police department in *Strandell* or the dispute over the design and construction of the nuclear power plant found in *Cincinnati Gas*, should not be resolved in the private arena of SJT. Public interest cases should receive open court determination to inform the public about the dispute and to lay the groundwork for valuable court precedent.<sup>199</sup>

2. *Consider anticipated savings for both the courts and the parties.* SJT often is criticized as being too court-centered and for merely adding another costly step in the litigation process. Before selecting a case for mandatory SJT, judges should balance carefully the potential time and cost impact of the case not only on the court, but also on the disputants. Any decision to mandate SJT should be founded upon a clear understanding of potential cost and time savings for all parties involved. For example, the attorneys in the *Arabian American Oil* case anticipated seven courtroom weeks to try their dispute.<sup>200</sup> The judge's requirement that they consider a two-day SJT prior to this enormous expenditure of time and money<sup>201</sup> is reasonable and fair to both the court and the parties. Even if settlement is not achieved, SJT may help to clarify issues and improve attorney preparedness that can save time and money during the actual trial.<sup>202</sup>

3. *Limit opportunities for discovery or work-product abuse.* As a synopsis of a trial, the SJT is based on the information disclosed during the pre-trial discovery process. Prior to trial, judges mandate comprehensive pre-trial orders that include the exchange of witness lists and summaries of testimony, and the identification of exhibits. These pre-trial orders are aimed at avoiding surprise at the time of trial and encouraging settlement before trial.<sup>203</sup> Clear pre-SJT rulings on disputed evidentiary issues will clarify the materials that may properly be presented to the advisory jury. Judicial vigilance during SJT will avoid attempts to skew SJT verdicts through the introduction of surprise or inadmissible evidence. In addition, judges should use their experience to evaluate party conduct during discovery for hints of potential bad faith or abuse during SJT. The *Strandell* case is a good example of how one party could have abused SJT to make up for a failure to

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199. See *supra* note 35 and accompanying text.

200. *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448, 449 ((M.D. Fla. 1988).

201. *Id.*

202. See *supra* note 39 and accompanying text.

203. See, e.g., *Federal Reserve Bank v. Carey-Canada, Inc.*, 123 F.R.D. 603, 606 (D. Minn. 1988) (asserting that "trial by ambush" is no longer accepted in federal civil trials); *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 48 (E.D. Ky. 1988) (same).

undertake diligent discovery. In situations like *Strandell*, judges would be well-advised to avoid mandatory SJT.

4. *Case complexity should be considered before mandating SJT.* Judge Lambros indicated that courts successfully have utilized SJT in both complex and simple cases involving varied areas of substantive law and numerous parties. The judge based this contention upon the voluntary use of SJT, which may explain some of its success.<sup>204</sup> The subsequent Alfini and Metzloff studies, dealing with both voluntary and mandatory SJT programs, suggest that SJT may be unfair or ineffective in cases involving multiple parties and complex issues of law and fact.<sup>205</sup> Judges should therefore account for case complexity before ordering mandatory SJT. Judges should consider single plaintiff-single defendant cases with few critical issues of law and fact in dispute (e.g., primarily damage valuation) as good candidates for compulsory SJT use. Cases involving multiple parties and complex issues may be better served by voluntary SJT, full trials, or arbitration before experienced arbitrators.

5. *Ensure process and document confidentiality.* Unlike the situation in *In re NLO*, confidentiality should be guaranteed both during and after the completion of the process as asserted in *Cincinnati Gas*.<sup>206</sup> Confidentiality will help to assuage parties' concerns that skewed summary information is being provided to the general public without adequate evidentiary or procedural safeguards. Proper judicial supervision and the rejection of public interest cases can avoid concerns about abuses of SJT confidentiality.

6. *Allow opportunities for parties to control and design SJT procedures.* The Alfini and Metzloff studies show that party control over SJT will improve party satisfaction with the fairness of the process and the quality of the outcomes.<sup>207</sup> Concerns about mandatory SJT may be lessened if parties, in cooperation with the judge, are permitted the opportunity to tailor the procedure to better suit their individual disputes. Areas for process design and control could easily include (1) the scheduling of acceptable SJT dates, (2) methods of jury selection and jury size, (3) length of summary presentations, (4) utilization of live or videotaped testimony with opportunities for cross-examination (particularly when witness credibility is critical), (5) high-low parameters for jury awards, (6) input on jury instructions, and (7) the binding or nonbinding nature of process.<sup>208</sup> By allowing the parties to take a more active role in designing the process, participants in mandatory SJT may feel more confident about the quality and fairness of process outcomes.

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204. See *supra* notes 32, 36-39 and accompanying text.

205. See *supra* notes 75-86 and accompanying text.

206. See *supra* note 35 and accompanying text.

207. See *supra* notes 103-08 and accompanying text.

208. Metzloff, *supra* note 59, at 858-960; Vidmar & Rice, *supra* note 29, at 100.

7. *Inform the jury of its advisory role in advance.* Judge Posner's concern about the ethics of not telling the jury is well-founded.<sup>209</sup> Judges should take the time to explain to the jury its important advisory role in SJT. Judges should inform jurors that their efforts to render fair, advisory SJT verdicts may help to speed up case processing, decrease court backlogs, and reduce party and court time and costs. Jurors, as taxpayers, are concerned about court costs and, as seekers of justice, are concerned about fairness and efficiency in case processing. If properly informed about the benefits of their advisory verdict, jurors will be more likely to appreciate the seriousness and importance of their role.

8. *Create record-keeping systems to evaluate SJT use.* Although mandatory SJT has many critics, SJT may provide the opportunity for greater judicial innovation to help manage overcrowded dockets and to lessen excessive costs and delays. With the federal courts' authority to mandate SJT, the groundwork can be laid for more in-depth research on the overall effectiveness of both mandatory and voluntary SJT. Courts should institute record-keeping systems that will more adequately measure the efficiency, cost benefits, and quality of outcomes of both types of SJT. Once such systems are in place, SJT's role in resolving civil disputes can be effectively tested and determined.<sup>210</sup>

9. *Promote the use of voluntary SJT through attorney education.* As the Metzloff study suggests, obstacles to voluntary SJT use may be traced, in part, to the lack of attorney familiarity with the process.<sup>211</sup> The courts can make greater efforts to educate practicing attorneys about the process. Courts should sponsor informational sessions and continuing legal education workshops to help attorneys recognize the process, benefits, and flaws of SJT use. Law schools should introduce students to SJT and other ADR mechanisms. With a better understanding of the process, lawyers will be able to assist their clients in making informed decisions about voluntary SJT use and to help relieve concerns about mandatory SJT.

### CONCLUSION

SJT is an innovative ADR mechanism aimed at preserving party and judicial resources through more predictive and efficient dispute resolution. Unfortunately, the limited studies of SJT provide inconclusive results on SJT's ability to meet these goals. Despite the lack of definitive evidence to support SJT use, recent amendments to Rule 16 and its explanatory notes clearly support compelled participation in SJT and other ADR processes. The *Colgrove* Supreme Court case

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209. See *supra* note 111 and accompanying text.

210. Menkel-Meadow, *supra* note 29, at 43-44.

211. Metzloff, *supra* note 59, at 837; see Craco, *supra* note 117, at 499.

provides further support for the courts' inherent authority to mandate SJT. Federal court guidelines on case selection and screening are needed to maximize SJT advantages and minimize SJT disadvantages. In addition, with mandatory SJT in place, courts will be able to establish evaluation procedures to help measure the fairness and efficiency of the process as well as the quality of its outcomes. Mandatory SJT marks an opportunity for courts to assess more accurately whether the theoretical benefits of SJT can be demonstrated in practice.